Supreme Court, U.S.
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In the
Supreme Court of the United States

DONALD BROWN,

Petitioner,

v.

KANSAS CITY FREIGHTLINER SALES, INC., doing business as Joplin Freightliner Sales; WESTFALL-O'DELL MOTORS, INC., doing business as Westfall-O'Dell Transportation Specialist,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is a case of first impression in this Court under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601-2654. The governing regulation, 29 C.F.R. § 825.303(b) (1995), states that in order to notify an employer sufficiently of the need for unforeseeable FMLA leave an employee must "only state that leave is needed" and that the "employer will be expected to obtain any additional required information through informal means."

In contrast, the United States Court of Appeals for the Eighth Circuit has created its own self-proclaimed "rigorous notice standard" under which the employee must affirmatively indicate "both the need and the reason for the leave," making the employer aware "that the absence is due to a serious illness," and the anticipated date of return to work.

The other circuits that have addressed the issue apply varying notice requirements that fall into five general classes ranging from the language of the regulation to differing heightened degrees of notice. All of those favor the employee, however, and none approaches the Eighth Circuit's "rigorous notice standard," which instead favors the employer.

This Court has never addressed what the notice standard should be. Thus, the questions presented are these:

1. To give proper notice of the need for unforeseeable FMLA leave, may an employee simply do what the regulation requires - "only state that leave is needed"?

2. If an employee must do more than "only state that leave is needed," what notice must he or she give in order to invoke the protections of the FMLA?

3. Does the Eighth Circuit's "rigorous notice standard" impermissibly create a notice requirement beyond that which is necessary for notice of the need for unforeseeable FMLA leave and thus for invoking the protections of the FMLA?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered August 19, 2010.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. 1a-7a) is reported at 617 F.3d 995 (8th Cir. 2010). The district court's order granting summary judgment for Defendants is not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was entered on August 19, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

REGULATORY PROVISION INVOLVED

The governing regulation is 29 C.F.R. § 825.303 (1995).[1] That regulation provides:

> (a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer

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[1] This regulation was amended in 2009. For the reasons discussed below, however, the amendment does not moot any of the questions presented. *See* pp. 24-26, *infra*.

within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

(b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile ("fax") machine or other electronic means. Notice may be given by the employee's spokesperson (e.g., spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

STATEMENT OF THE CASE

A. Factual Background.

On June 18, 2007, Petitioner Donald Brown injured his back while working as a technician and heavy duty

truck mechanic for Respondents ("Defendants").[2] Brown immediately notified his supervisor, Mike Yokely, and sought treatment for his back pain that same day. A doctor diagnosed Brown's injury as a lumbar sprain or strain, and released Brown from care with no restrictions.

Two months later, on August 29, Brown again experienced back pain when he injured himself while working. Brown notified Yokely, sought treatment that same day, and was again diagnosed as having a lumbar sprain or strain. Brown's doctor prescribed medications and released Brown to work with restrictions. Throughout the following month, Brown had three follow-up doctors' visits placing him on work restrictions and treating him with medications. At his third follow-up doctor's visit, Brown's doctor ordered him to "work as tolerated." Yokely knew of that working condition when Brown returned to work.

Five days later, on September 26, Brown again experienced the same back pain, as well as pain down his left arm, while working. Brown informed Yokely, "I hurt my back again and I want to go home." Yokely replied, "do you want to go to my office and act like a man or talk to me like a man[?]" Brown responded, "No, Mike, I hurt my back, I want to go home." Yokely

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[2] Brown was employed by Respondent Kansas City Freightliner Sales, Inc. ("KCF"). Brown sued both KCF and Westfall-O'Dell Motors, Inc., as "joint employers" and "integrated employers" because they share common ownership. The Respondents did not dispute the fact of common ownership and obtained summary judgment for both of them on Brown's claims. Accordingly, Respondents will be referred to collectively as "Defendants" in this Petition.

then engaged Brown in a heated discussion because Yokely believed that Brown was not actually injured, but instead wanted to leave because he was upset about a wage posting on the bulletin board.

Brown was experiencing so much pain that he left work and went home. The pain was so severe that Brown could not sleep at night, which prevented him from working the following day, Thursday, September 27, through the next Tuesday, October 2. Brown missed four consecutive work days, for which he called in each day. During that period, on Sunday, September 30, Brown drove to Wal-Mart to buy some Advil and saw some co-workers along the way.

On Tuesday, when Brown's co-worker told Yokely that he had seen Brown driving, Yokely believed that Brown was lying about missing work due to his back injury. Yokely, together with Defendants' manager and Defendants' owner, decided to terminate Brown. When Brown returned to work on Wednesday, October 3, Defendants terminated him.

Because Brown was experiencing the same symptoms as he had the week before, and because he already had medicine, Brown took medications from his recent doctors' visits to get him through his four-day work absence and the following ten days. The pain down his back and pain and numbness in his left arm continued to get so much worse, however, that Brown saw his doctor on October 12. Brown reported his history of extremity numbness to his doctor.

Throughout the following three weeks, Brown had four more doctors' visits, during which he received x-rays, an echocardiogram, a CT scan, diagnostic testing,

and an MRI. During at least two of those visits, Brown complained of a history of tingling and numbness in his left arm. A doctor finally diagnosed Brown with degenerative disc disease on November 26 and referred him to a surgeon.

On April 25, 2008, the surgeon operated on Brown's spine, and Brown was hospitalized for two nights. On May 12, 2008, Brown reported post-surgery that he had no pain and felt good.

On the day Defendants terminated Brown, he contacted Defendants' Human Resources manager and asked for the reason for his termination. Defendants' owner instructed the HR manager to ignore Brown's request for a reason for termination. On January 7, 2008, Brown requested a Service Letter under MO. REV. STAT. § 290.140.1 (2006). After receiving the request, Defendants' owner tried to insure that the Service Letter response was accurate. He encouraged Yokely and Defendants' manager to "try to come up with some other trash on Don Brown," such as "tardiness, attitude, charge backs, etc." Nevertheless, the Service Letter identified Brown's failure to appear for work on September 27-28 and October 1-2 as the only reason for Brown's discharge.

Defendants' policy manual does not say how an absent employee must report an illness. No one had ever reprimanded Brown for calling in sick or asked him to substantiate his reason for missing work.

B. The Trial Court Proceedings.

Brown filed a lawsuit against Defendants in the United States District Court for the Western District

of Missouri, Southern Division, asserting claims for failing to reinstate him in violation of 29 U.S.C. § 2614(a) (1993)[3] (Count I), and wrongfully terminating him in violation of 29 U.S.C. § 2615 (1993) (Count II). Defendants and Brown subsequently filed cross-motions for summary judgment. The District Court denied Brown's motion for partial summary judgment against Kansas City Freightliner Sales as to liability on Count I and granted Defendants' motion for summary judgment on both claims. The court held that Defendants were entitled to summary judgment because Brown could not prove the required element for each of his claims that he was entitled to FMLA leave. The court found that Brown did not fulfill two requirements of the element of FMLA leave entitlement: 1) that he suffered a "serious health condition", and 2) that he gave Defendants adequate notice that his condition was serious. (App. 10a-24a).

The District Court's finding that Brown did not suffer a "serious health condition" rested on the fact that Brown did not seek treatment from a health care provider during his four-day absence from work. Neither the FMLA, its regulations, nor Eighth Circuit law, however, contain such a requirement. The court's brief consideration of whether Brown provided adequate notice to Defendants also improperly focused on Brown's failure to seek treatment during his absence and to obtain a doctor's note or medical certification for his absence, which Defendants never

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[3] Some of the FMLA statutory provisions and related regulations at issue in this case were amended in 2008 and 2009. Because the underlying facts surrounding Brown's termination occurred in 2007, the FMLA statutory provisions and regulations in effect in 2007 control in this case.

requested. The court further held that Brown's previous back injuries in June and August did not provide a sufficient basis to establish that Defendants had notice in September of Brown's "serious health condition." (App. 17a-24a).

C. The Court of Appeals' Review.

Brown appealed to the United States Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. §§ 1291 and 1294(1). Brown argued that he did have a "serious health condition" entitling him to FMLA leave because he received in-patient care and continuing treatment in connection with his injury pursuant to 29 U.S.C. § 2611(11) (2004), and Defendants failed in their duty to request medical certification in accordance with 29 U.S.C. § 2613 (1993). Brown further argued that he gave Defendants adequate notice of his serious health condition and that Defendants admitted that they had actual notice that Brown was claiming leave for his unresolved back injury.

The Court of Appeals did not address the District Court's finding that Brown did not establish he suffered a "serious health condition" due to his failure to seek treatment during his absence, even though the District Court held that issue was dispositive of the case and gave only brief consideration to the issue of notice. The Court of Appeals affirmed the District Court's judgment on the basis that Brown failed to satisfy the "rigorous notice standard" in the Eighth Circuit. Quoting *Scobey v. Nucor Steel-Arkansas*, 580 F.3d 781, 786 (8th Cir. 2009), the Court of Appeals explained that its "rigorous notice standard" requires employees seeking to use FMLA leave for absences to

indicate "both the need and the reason for the leave, and must let employers know when they anticipate returning to their position." The *Scobey* standard additionally requires employees to indicate that the leave is due to a serious illness. *Id.* The Court of Appeals found that Brown failed to meet these requirements because he did not inform Defendants of his exact diagnosis, namely that he was suffering "cervical distress," or that the injury was connected to his earlier "lumbar injury." Further, the Court of Appeals held that even if there was a connection between the injuries, Brown did not apprise Defendants of his need or reason for leave, despite the fact that he told them "I hurt my back again and I want to go home." (App. 1a-7a).

Brown now seeks a writ of certiorari from this Court.

REASONS FOR ALLOWING THE WRIT

For at least these reasons, the Court should grant the writ of certiorari:

First, there is a marked division among the United States Courts of Appeals with regard to the requirements for providing notice to an employer of unforeseeable FMLA leave, resulting in inconsistent treatment of employees and unpredictable outcomes under the law. This Court, therefore, should definitively declare a nationwide standard for what an employee must do to notify an employer of the need for unforeseeable FMLA leave.

Second, despite the marked division among the other circuits that have addressed the issue,[4] Brown satisfied the notice requirements of all of those circuits. The Eighth Circuit stands apart. The Eighth Circuit's decision, therefore, not only adds to the regulation but also conflicts with the decisions in all of those other circuits.

The Court should grant the writ of certiorari despite the 2009 amendments to 29 C.F.R. § 825.303. The amended regulation tracks the notice requirements of only some of the circuits, and Brown satisfied the requirements of the amended regulation. *See* pp. 24-26, *infra*. Accordingly, the division among the circuits still remains, and the Eighth Circuit's decision in this case still conflicts with the decisions of the other Courts of Appeals.

A. The Court Should Decide What an Employee Must Tell an Employer When Requesting FMLA Leave for an Unforeseeable Absence.

The FMLA treats unforeseeable leave differently than foreseeable leave. The FMLA regulation regarding notice of unforeseeable leave in effect at the time of Brown's injury provided that the "employee need not expressly assert rights under the FMLA or even mention the FMLA, but *may only state that leave is needed*. The employer will be expected to obtain any additional required information through informal

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[4] The United States Courts of Appeals for the District of Columbia and the Federal Circuit and their respective district courts and underlying agencies have not addressed the requirements for giving sufficient notice of FMLA leave for an unforeseeable absence.

means." 29 C.F.R. § 825.303 (1995) (emphasis added). The recently amended regulation is similarly non-burdensome, providing that an employee "shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job;...and the anticipated duration of the absence, if known." 29 C.F.R. § 825.303 (2009).[5]

Within the framework of that regulatory language both before and after the amendment, the Courts of Appeals have developed inconsistent standards over the years for the requirements of giving notice of unforeseeable FMLA leave, resulting in a marked division between the circuits. The division encompasses six different notice standards.

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[5] The FMLA statute, 29 U.S.C. §§ 2601-2654 (2009), does not provide any further guidance as to giving notice of unforeseeable leave. While § 2612(e) discusses notice of foreseeable leave, the only provision within the statute addressing unforeseeable leave is the definition of "eligible employee" under § 2612(2)(A). That provision states that an "eligible employee" is an employee who has been employed for at least twelve months and "with respect to whom leave is requested." That statutory language is substantially similar to the version of 29 C.F.R. § 825.303 in effect at the time of Brown's termination, which provided that an employee must "only state that leave is needed."

1. *The First Circuit requires an employee to state only that leave is needed.*

The first standard, applied only in the First Circuit, requires the employee to inform the employer merely that leave is needed. Although the United States Court of Appeals for the First Circuit has not issued any opinions on the issue of notice of FMLA leave, there are two district court cases that discuss the issue. *See Wheeler v. Pioneer Dev. Servs., Inc.*, 349 F. Supp. 2d 158, 166 (D. Mass. 2004); *De Hoyos v. Bristol Lab. Corp.*, 218 F. Supp. 2d 222, 225 (D.P.R. 2002).

In *Wheeler*, the United States District Court for the District of Massachusetts held that all an employee must do to notify her employer of unforeseeable leave is "simply state that leave is needed." 349 F. Supp. 2d at 166. Once the employee notifies her employer that she needs leave, "and the circumstances suggest that the employee's request may involve FMLA leave," it is the employer's obligation to inquire further. *Id.* The court further held that the employee does not have to support a request for leave with a doctor's note. *Id.* at 169.

Similarly, in *De Hoyos*, the United States District Court for the District of Puerto Rico held that the employee "is responsible for alerting the employer of his need for FMLA leave," and that it "is the employer's responsibility... to then decide whether the requested leave qualifies under the FMLA based on the information provided by the employee." 218 F. Supp. 2d at 225.

Accordingly, the first notice standard is a minimal standard, requiring the employee to inform the

employer only that leave is needed. That requirement comports with the requirements of 29 C.F.R. § 825.303 (1995), which provides that an employee "may only state that leave is needed."

2. *The Tenth Circuit requires the employee to give enough information to the employer to indicate that the employee might qualify for FMLA leave.*

The second standard requires the employee to give enough information to the employer to indicate that the employee *might* qualify for FMLA leave. The Tenth Circuit applies this standard, holding that "if the employer is on notice that the employee might qualify for FMLA benefits, the employer has a duty to notify the employee that FMLA coverage may apply." *Tate v. Farmland Indus., Inc.*, 268 F.3d 989, 997 (10th Cir. 2001); *Moss v. Bluecross, Blue Shield of Kan., Inc.*, 534 F. Supp. 2d 1190, 1200 (D. Kan. 2008). "An employer is then expected to obtain any additional required information through informal means." *Moss*, 534 F. Supp. 2d at 1200. In *Tate*, the Tenth Circuit held that the employee was not required to say *anything* to his employer about his work absence because the employer had placed him on involuntary sick leave while it evaluated his annual medical examination form; thus, the employer was on notice that he might qualify for FMLA benefits. 268 F.3d at 997.

Accordingly, the second notice standard places no specific requirements on the employee and instead focuses on whether the employer had information indicating that the employee might be entitled to FMLA benefits.

3. *The Fourth, Fifth, Ninth and Eleventh Circuits require the employee to state the reason for the needed leave.*

The third standard requires the employee to state the reason for the needed leave, placing the duty on the employer to determine if that reason qualifies under the FMLA. The Fourth, Fifth, Ninth and Eleventh Circuits apply this standard.

The Fourth Circuit held in *Krenzke v. Alexandria Motor Cars, Inc.*, 289 F. App'x 629, 632 (4th Cir. 2008), that "the employee need only inform her employer that she needs leave from work for a medical reason....[T]he burden then shifts to the employer to gather additional information and determine if the FMLA is actually implicated....The employer has the duty to elicit the details required under the FMLA."

Similarly, the Fifth Circuit in *Saenz v. Harlingen Med. Ctr., L.P.*, 613 F.3d 576, 583 (5th Cir. 2010), held that "[t]he FMLA requires only that an employee contact her employer and state that leave is needed as soon as practicable under the facts and circumstances of the particular case....Once an employee meets this low threshold, she is merely required to respond to reasonable employer inquiries for additional information." The court found that the employee's mother, who told the employer that employee could not work because she was severely disoriented and hallucinating, thereby informed the employer that employee was suffering from a serious health condition and thus provided the minimum required notice under the FMLA. *Id.* at 583-84.

The Ninth Circuit held in *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1130 (9th Cir. 2001), that an employee need only communicate to the employer that he will be absent "under circumstances which indicate that the FMLA might apply." Quoting the applicable regulation, the court specified that the employee may state only that leave is needed for a reason that qualifies under the FMLA. *Id.* The employer has the duty to inquire further to determine if the leave is due to a serious health condition. *Id.* at 1130-31. "In short, the employer is responsible, having been notified of the reason for an employee's absence, for being aware that the absence may qualify for FMLA protection." *Id.* at 1131.

In *Lowery v. Strength*, 356 F. App'x 332, 333 (11th Cir. 2009), the Eleventh Circuit held that "[w]hen an employee's need for FMLA leave is unforeseeable, the employee need only provide his employer with notice sufficient to make the employer aware that his absence is due to a *potentially FMLA-qualifying reason*." (emphasis in original). Once the employee provides the employer with a "potentially FMLA-qualifying reason," the employer must then ascertain whether the reason actually qualifies for FMLA leave. *Id.*

4. ***The Second and Sixth Circuits require the employee to give the employer enough information to reasonably apprise it of the employee's request to take time off for a serious health condition.***

The fourth standard requires the employee to give the employer enough information for the employer to reasonably infer that the employee is requesting time

off for a serious health condition. The Second and Sixth Circuits apply this standard.

Although the United States Court of Appeals for the Second Circuit has not issued any opinion as to the requirements for notice of unforeseeable leave, there are several district court cases out of the Second Circuit that hold "[i]n assessing notice under the FMLA, the critical question is whether information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition." *Fischer v. NYC Dept. of Educ.*, 666 F. Supp. 2d 309, 318 (E.D.N.Y. 2009). *See also Basso v. Potter*, 596 F. Supp. 2d 324, 341 (D. Conn. 2009); *Garraway v. Solomon R. Guggenheim Found.*, 415 F. Supp. 2d 377, 383 (S.D.N.Y. 2006).

Similarly, the Sixth Circuit held in its principal FMLA-notice decision, *Cavin v. Honda of Am. Mfg., Inc.*, 346 F.3d 713, 723 (6th Cir. 2003):

> [T]o invoke the protection of the FMLA, an employee must provide notice and a qualifying reason for requesting the leave....Because an employee need not expressly invoke the FMLA, the critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition.

Accordingly, the fourth notice standard focuses on whether it would be "reasonable" for the employer to infer, based upon the information it has been given, that the employee is requesting time off for a serious health condition.

5. *The Third and Seventh Circuits require the employee to state the reason for leave with enough specificity to establish "probable cause" that the employee is entitled to FMLA leave.*

The fifth standard requires the employee to state the reason for leave with enough specificity to establish "probable cause" that the employee is entitled to FMLA leave. The Third and Seventh Circuits apply this standard.

The Third Circuit, in *Sarnowski v. Air Brooke Limousine, Inc.*, 510 F.3d 398 (3d Cir. 2007), provided this general rule with regard to notice:

> In providing notice, the employee need not use any magic words. The critical question is how the information conveyed to the employer is reasonably interpreted. An employee who does not cite to the FMLA or provide the exact dates or duration of the leave requested nonetheless may have provided his employer with reasonably adequate information under the circumstances to understand that the employee seeks leave under the FMLA.

Id. at 402. Expanding on those guidelines from *Sarnowski*, the United States District Court for the Western District of Pennsylvania held that the employee must state the reason for leave with enough specificity "to establish probable cause" that the employee is entitled to FMLA leave. *Hayduk v. City of Johnstown*, 580 F. Supp. 2d 429, 455 (W.D. Pa. 2008).

Similarly, the Seventh Circuit, in *Stevenson v. Hyre Elec. Co.*, 505 F.3d 720, 724-25 (7th Cir. 2007), held:

> [T]he notice requirement is not demanding[.] The employee's duty is merely to place the employer on notice of a probable basis for FMLA leave. He doesn't have to write a brief demonstrating a legal entitlement. He just has to give the employer enough information to establish probable cause, as it were, to believe that he is entitled to FMLA leave. Once that is done, then it becomes the employer's duty to request such additional information from the employee's doctor or some other reputable source as may be necessary to confirm the employee's entitlement.

(internal citations omitted).

Accordingly, the fifth notice standard requires the employee to state the reason for the requested leave, providing the employer with enough information to establish "probable cause" that the employee is entitled to FMLA leave.

6. *The Eighth Circuit requires the employee to inform his employer that leave is needed, that the leave is due to a serious illness, and the anticipated date of return to work.*

The sixth standard requires the employee to inform his employer 1) that leave is needed, 2) that the leave is due to a serious illness, and 3) the anticipated date of return to work. Only the Eighth Circuit applies this self-proclaimed "rigorous notice standard."

In *Scobey v. Nucor Steel-Arkansas*, 580 F.3d 781, 786 (8th Cir. 2009), the Eighth Circuit held that employees "have an affirmative duty to indicate both the need and the reason for the leave, and must let employers know when they anticipate returning to their position." *Further*, "the employer must be made aware that the absence is due to a serious illness so the employer can distinguish it from ordinary 'sick-days,' or even malingering, as a type of unusual and privileged absence." *Id.* The Eighth Circuit took this "rigorous notice standard" a step further when it affirmed the District Court's judgment in the instant case, holding that Brown was required to inform his employer of his exact diagnosis, namely his "cervical problem" that ultimately lead to his surgery. *Brown v. Kansas City Freightliner Sales, Inc.*, 617 F.3d 995, 998 (8th Cir. 2010); (App. 7a). That requirement does not comport with the requirements of 29 C.F.R. § 825.303 (1995), which provides that an employee must "only state that leave is needed."

The result of having no less than six different standards being applied across the United States is uncertainty as to what is required of employees on the one hand and employers on the other, as well as inconsistent treatment of employees who provide equal information to their employers. This Court, therefore, should clarify what information an employee is required to give an employer when the need for FMLA leave is unforeseeable.

B. The Eighth Circuit's Decision in this Case Conflicts with the Decisions of the Other Circuits Because the Information That Donald Brown Gave His Employer Satisfied the Notice Requirements from All of the Other Circuits.

When the facts of this case are viewed in the light most favorable to Brown, as required on appeal from a grant of summary judgment, *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. 92, 94 (1994), the information that Brown gave Defendants satisfied the notice requirements from every circuit other than the Eighth Circuit.

On September 26, Brown gave Defendants the underlying medical reason for missing work when he stated, "I hurt my back again and I want to go home." He then repeated that statement after Yokely told him to "go to my office and act like a man or talk to me like a man," replying, "No, Mike, I hurt my back, I want to go home." When Brown told Yokely that he had hurt his back "again," and immediately left work and called in his absences for the next four days, Yokely was aware of Brown's history of back injuries over the preceding months, for which Brown had no fewer than five doctors' visits and was placed on work restrictions. Yokely knew that only five days before Brown told Yokely that he had hurt his back "again," Brown had returned to work with instructions from his doctor to "work as tolerated."

The information that Defendants had about Brown's four-day absence satisfied the notice requirements under all of the standards described in

Section A above, except for the sixth standard applied in the Eighth Circuit.

1. ***Brown satisfied the requirements of the First Circuit's notice standard.***

The first notice standard requires an employee to inform the employer merely that leave is needed. Pp. 11-12, *infra*. Once the employee notifies the employer that he needs leave, "and the circumstances suggest that the employee's request may involve FMLA leave," it is the employer's obligation to inquire further. *Wheeler*, 349 F. Supp. 2d at 166. Brown clearly satisfied this standard when he told Yokely, "I hurt my back again and I want to go home," immediately left work, and called in his absences for the next four days. As discussed above, the "circumstances" suggested that Brown "may" need FMLA leave because Defendants knew of Brown's recent back injuries and his doctor's instructions to "work as tolerated." That information triggered Defendants' duty to inquire further. Instead, they fired Brown.

2. ***Brown satisfied the requirements of the Tenth Circuit's notice standard.***

Brown also satisfied the requirements of the second notice standard, which requires the employee to give enough information to the employer to indicate that the employee *might* qualify for FMLA leave. P. 12, *infra*. Again, Brown's statements to Yokely followed by his four-day absence, and Defendants' knowledge of Brown's recent injuries and work restrictions, certainly indicated that Brown *might* be in need of FMLA leave. Defendants, therefore, had a duty to notify Brown that FMLA coverage may apply and to

obtain any additional required information through informal means. *Moss*, 534 F. Supp. 2d at 1200. Instead, Defendants made no attempt to contact Brown and terminated him immediately upon his return to work.

3. *Brown satisfied the requirements of the notice standard from the Fourth, Fifth, Ninth and Eleventh Circuits.*

The third notice standard requires the employee to state the reason for the needed leave, placing the duty on the employer to determine if that reason qualifies under the FMLA. Pp. 13-14, *infra*. Brown stated the reason for missing work when he told Defendants, "I hurt my back again and I want to go home." Once Brown met that "low threshold," the burden shifted to Defendants to gather additional information from Brown to determine whether he was actually entitled to FMLA benefits. *Saenz*, 613 F.3d at 583-84; *Krenzke*, 289 F. App'x at 632. Defendants, however, did not seek any further information from Brown before terminating him due to his work absence.

4. *Brown satisfied the requirements of the notice standard from the Second and Sixth Circuits.*

The fourth notice standard requires the employee to give the employer enough information for the employer to reasonably infer that the employee is requesting time off for a serious health condition. Pp. 14-15, *infra*. Defendants could reasonably infer that Brown missed work due to a serious health condition based upon their knowledge of his recent back injuries and work restrictions, and Brown's statements to

Yokely that he had hurt his back "again" and needed to go home, immediately followed by Brown's four-day absence. With that knowledge, Defendants were "reasonably apprised" that Brown had a serious health condition. *Cavin*, 346 F.3d at 723. Whether Defendants believed that Brown had actually injured his back again or not, Defendants had sufficient information to reasonably inform them of Brown's serious health condition.

5. *Brown satisfied the requirements of the notice standard from the Third and Seventh Circuits.*

Brown also satisfied the fifth notice standard, which requires the employee to state the reason for the requested leave, providing the employer with enough information to establish "probable cause" that the employee is entitled to FMLA leave. Pp. 16-17, *infra*. As previously discussed, Brown stated his underlying medical reason for missing work when he told Yokely that he had hurt his back "again" and needed to go home. Brown immediately left work and called in for the next four days. Brown's use of the word "again" referred to the fact that Defendants knew he had recent back injuries and work restrictions. That knowledge, together with Brown's four-day absence for another reported back injury, established a "probable basis" that Brown was entitled to FMLA leave. *Stevenson*, 505 F.3d at 724-25. It then became Defendants' "duty to request such additional information from [Brown's] doctor or some other reputable source" to confirm whether Brown was in fact entitled to FMLA benefits. *Id.* Defendants, however, never requested medical certification or any

other information from Brown or his doctors. Instead, they fired him immediately upon his return.

6. *The Eighth Circuit's decision in this case conflicts with the decisions of the other circuits.*

The sixth notice standard applied by the Eighth Circuit in this case conflicts with the five standards applied by the other Courts of Appeals and with the FMLA and its regulations. Pursuant to the standard applied by the Eighth Circuit in this case, an employee is required to inform the employer not only that leave is needed, the reason for the leave, and the anticipated date of return to work, but also the exact diagnosis of the serious health condition that necessitates the leave. *Brown*, 617 F.3d at 998; (App. 6a-7a). The Court held that Brown failed to give Defendants adequate notice of his September injury because Defendants only had knowledge of Brown's prior "lumbar injury" and were not informed that Brown's September injury was a "cervical problem." *Id.* "[E]ven if there was a connection between the two injuries," the Court held, "the information Brown gave to [Defendants] from September 26 through October 2, 2007, did not apprise [Defendants] of his reason or need for FMLA leave." *Id.* Accordingly, Brown's statement to Defendants, "I hurt my back again," was not enough. Brown was required to self-diagnose himself on September 26 and inform Defendants exactly what type of back injury he was suffering.

None of the other standards applied by the Courts of Appeals, nor 29 C.F.R. § 825.303, require an employee to provide a specific diagnosis to an employer. Brown satisfied the requirements of 29

C.F.R. § 825.303 and the notice standards used by all other Courts of Appeals. In fact, Defendants admitted that they knew the reason for Brown's absence when they fired him. The Service Letter that Defendants gave Brown pursuant to MO. REV. STAT. § 290.140.1 (2006), stated:

> Later on that day, you left work, claiming you had a bad back but [Yokely] was left with the distinct impression you were simply mad about the posting on the shop's bulletin board.

Furthermore, Yokely admitted in his deposition testimony that he knew Brown claimed he was missing work on account of his back. Whether Defendants believed Brown or not, they were on notice that Brown might have a condition entitling him to FMLA leave. That triggered their duty to inquire further. Instead, they fired Brown.

The Eighth Circuit's decision in this case is, therefore, in conflict with the other Courts of Appeals, and this Court should reverse that decision.

C. This Court Should Grant the Writ Even in Light of the Amendments to 29 C.F.R. § 825.303 Because the Amended Regulation Tracks the Notice Requirements from Only Some of the Circuits and Brown Satisfied the Requirements of the Amended Regulation.

The 2009 amendments to 29 C.F.R. § 825.303 did not eliminate the split in the circuits or the conflict between the Eighth Circuit and the other Courts of Appeals regarding the requirements for giving notice of unforeseeable FMLA leave. The amended

regulation, which provides that "an employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request," tracks the notice requirements from only some of the circuits. The amended regulation is most akin to the requirements of the fourth notice standard applied in the Second and Sixth Circuits, and the fifth notice standard applied in the Third and Seventh Circuits. Pp. 14-17, *infra*. The fourth notice standard requires an employee to give the employer enough information to "reasonably apprise" the employer that the employee is requesting leave for a serious health condition. *Cavin*, 346 F.3d at 723. The fifth notice standard requires the employee to give the employer enough information "to establish probable cause" that the employee is entitled to FMLA leave. *Stevenson*, 505 F.3d at 724-25. The amended regulation similarly focuses on whether the employer could reasonably determine that the employee was entitled to FMLA leave based upon the information provided by the employee. Accordingly, even after the amendments to 29 C.F.R. § 825.303, there is still a division among the circuits as to the requirements for giving notice, falling into six general classes ranging from the language of the regulation to differing heightened and lessened degrees of notice.[6]

Furthermore, the Eighth Circuit's decision in this case still conflicts with the decisions of the other Courts of Appeals, because Brown not only satisfied

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[6] As explained on p. 10, *infra*, footnote 5, even after the amendments to the FMLA regulations, the conflict as to notice of unforeseeable leave remains because the FMLA statute has not been changed and the statutory language is substantially similar to the prior version of 29 C.F.R. § 825.303.

the notice requirements from every other circuit as discussed in Section B above, but he also satisfied the requirements of the amended regulation. As previously discussed, Defendants could reasonably determine that Brown missed work due to a serious health condition based upon their knowledge of his recent back injuries and work restrictions, and Brown's statements to Yokely that he had hurt his back "again" and needed to go home, immediately followed by Brown's four-day absence. Whether Defendants believed that Brown had actually injured his back again or not, Defendants certainly had sufficient information to reasonably determine that Brown *may* be in need of FMLA leave, which is all that the amended regulation requires.

This Court, therefore, should grant the writ of certiorari because the questions presented in this case apply even in light of the amendments to 29 C.F.R. § 825.303.

CONCLUSION

There is a marked division among the United States Courts of Appeals regarding the requirements for providing notice to an employer of unforeseeable FMLA leave, resulting in inconsistent treatment of employees and unpredictable outcomes under the law. This Court, therefore, should grant the writ of certiorari and decide what an employee must tell an employer when requesting FMLA leave for an unforeseeable absence.

Alternatively, the Eighth Circuit's decision in this case conflicts with the decisions of other United States Courts of Appeals because Brown satisfied the notice

requirements in all other circuits that have addressed the issue. This Court, therefore, should grant the writ of certiorari to resolve the conflict and reverse the decision of the Eighth Circuit.

Respectfully Submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 09-3324

[Filed August 19, 2010]

Donald Brown,	)
	)
Appellant,	)
	)
v.	)
	)
Kansas City Freightliner Sales, Inc., doing business as Joplin Freightliner Sales; Westfall-O'Dell Motors, Inc., doing business as Westfall-O'Dell Transportation Specialist,	)
	)
Appellees.	)

Appeal from the United States District Court for the Western District of Missouri

Submitted: June 16, 2010
Filed: August 19, 2010

Before MURPHY, BEAM, and BENTON, Circuit Judges.

BEAM, Circuit Judge.

Donald Brown appeals the district court's[1] grant of summary judgment in favor of his employer, Kansas City Freightliner Sales (KCF), in his failure-to-reinstate and wrongful termination claims under the Family and Medical Leave Act (FMLA). We affirm the district court.

I. BACKGROUND

Brown worked as a service technician for KCF from April 2000 to October 2007. In both June and August 2007, Brown injured his back at work. After the June incident, Brown completed an injury incident form, visited the occupational doctor, and was released to work that same day with no restrictions. The record indicates that Brown's injury at that time was a lumbar sprain or strain. After the August injury, Brown again submitted a written injury report, and the injury was diagnosed as a lumbar strain. He was prescribed medication and was released back to work immediately, but with certain activity restrictions. He followed up with doctor visits and on September 21, 2007, he was released with no restrictions to "work as tolerated."

On Wednesday, September 26, Brown verbally reported to his supervisor that he had hurt his back

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[1] The Honorable Dean Whipple, United States District Judge for the Western District of Missouri.

again and that he wanted to go home. He did not submit a written injury report and refused medical treatment. Brown left work for the day after this verbal report and was then absent from work Thursday, Friday, Monday and Tuesday, September 27 through October 2, 2007. On each of these days, either Brown or his wife called him in sick but provided no other information. Brown did not seek medical treatment during this time. Instead, Brown testified that he was able to manage his pain with medications leftover from the previous injury.

Prior to the Wednesday, September 26 incident, Brown had already used up all of his authorized sick and vacation leave. When Brown returned to work on October 3, 2007, his employment was terminated. Subsequently, Brown had several medical appointments in October and November 2007, at which time he was eventually[2] diagnosed with degenerating and protruding cervical discs. The medical evidence from those visits indicates that Brown had an injury to his cervical spine, including numbness and tingling in his upper extremities. On April 25, 2008, he underwent surgery in the C4 through C7 cervical spine region. Brown's medical records from October 12, 2007, though the date of surgery in April 2008 do not reference an injury or accident occurring from September 26 through October 2, nor do they mention

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[2] Evidently in an attempt to discover the cause of left arm numbness, Brown underwent a number of diagnostic tests, including a chest x-ray, carotid ultrasonography, an echocardiogram, a CT scan of his brain, and finally, an MRI of his cervical spine.

a previous lumbar injury, other than in the general patient history section.[3]

Brown sued KCF for failure to reinstate and wrongful discharge in violation of the FMLA. Upon competing motions for summary judgment, the district court granted summary judgment in favor of KCF, finding that Brown did not suffer from a "serious health condition" as defined by the FMLA and that he failed to give adequate notice to KCF that he was suffering from a serious health condition. On appeal, Brown argues that the district court erred in granting summary judgment for KCF and also erred in not granting summary judgment in his favor.

II. DISCUSSION

We review the district court's grant of summary judgment de novo, giving Brown the benefit of all reasonable inferences. Reed v. City of St. Charles, 561 F.3d 788, 790 (8th Cir. 2009). In order for Brown to be entitled to FMLA[4] leave, he must show that he experienced a "serious health condition" during the absence period at issue. Woods v. DaimlerChrysler Corp., 409 F.3d 984, 990 (8th Cir. 2005). Further, Brown must show that he gave KCF adequate notice that he was seeking FMLA leave during the disputed time period. Id. Absent the required notice, the

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[3] On a "Spine Pain Questionnaire" filled out by Brown in January 2008, Brown indicates that his current injury began at work, but does not specify when or how.

[4] It is apparently undisputed that in September 2007, Brown had worked the qualifying number of months to be eligible for FMLA leave, and that KCF is an "employer" as defined by the FMLA.

employer's duty to provide FMLA leave[5] is not triggered. Kobus v. Coll. of St. Scholastica, Inc., 608 F.3d 1034, 1036-37 (8th Cir. 2010). Because it is dispositive, we consider the second requirement first.

The district court found that Brown failed to give KCF adequate (or any) notice that he was seeking FMLA leave for the September 27 through October 2 absence, rather than simply taking sick leave. In Scobey v. Nucor Steel-Arkansas, 580 F.3d 781 (8th Cir. 2009), we reiterated our rigorous notice standard for employees seeking to use FMLA leave for absences. "'Employees . . . have an affirmative duty to indicate both the need and the reason for the leave, and must let employers know when they anticipate returning to their position.'" Id. at 786 (quoting Woods, 409 F.3d at 990-91). The Scobey court noted that the adequacy of notice depends upon the facts of each case, and found that the employee's notice was lacking, even though the employee had been in contact with his employer on several occasions during his absence. Id. at 787-88. Indeed, the Scobey employee had called his employer various times during his several-day work absence, but told his employer, while intoxicated, that he was having a nervous breakdown. Id. at 783-84. Although this employee was in contact with his employer, his failure to provide the employer with a reason to differentiate the absence from ordinary sick days, or

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[5] "Under the act, an eligible employee is entitled to up to twelve weeks of unpaid leave during a twelve-month period '[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee.'" Rask v. Fresenius Med. Care N. Am., 509 F.3d 466, 471 (8th Cir. 2007) (quoting 29 U.S.C. § 2612(a)(1)(D)).

even possibly malingering, proved fatal to his FMLA claim. Id. at 789-90.

Arguably, the facts in Scobey are more compelling on the notice issue than in this case. Brown apparently became injured on September 26 while at work, and therefore had ample opportunity to inform his employer that his condition was more serious than the previous back injuries, which had involved little, if any, time off from work. He did not fill out a written injury report, despite having done so previously. When asked whether he needed medical attention before he left work, Brown stated that he did not. When he called in sick the next four work days, he offered no other information than that he was sick and would not be coming to work.

We acknowledge that Brown had two previous, documented back injuries, and subsequent to his September 27 to October 2 absence, went to several doctor appointments. However, there is a disconnect between the prior back injuries–which were in the lumbar region–and the subsequent back condition in the cervical spine area. There is no evidence in the record that there was any connection between the lumbar and cervical impairments. Indeed, Brown's physicians did not seem to connect the prior and latter injuries, as various diagnostic tests were run to discover the source of Brown's extremity numbness. In light of this lack of connection, KCF did not have notice of Brown's cervical distress (knowledge of which only began with his doctor appointments in October and November 2007 and culminated with surgery in April 2008) now purportedly connected to the earlier lumbar injury. At the time of his absences in late September and early October 2007, KCF only knew

that Brown had recently suffered a lumbar injury that had necessitated receipt of medical attention and the taking of minimal time off work. KCF was not informed of a cervical problem that would ultimately lead to Brown's surgery. And, even if there was a connection between the two injuries, the information Brown gave to KCF from September 26 through October 2, 2007, did not apprise KCF of his reason or need for FMLA leave. See id. at 786. Accordingly, Brown's FMLA notice was inadequate, KCF's FMLA duties were not triggered, and the district court's grant of summary judgment was appropriate.

III. CONCLUSION

We affirm the district court.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-3324

[Filed August 19, 2010]

Donald Brown,	)
	)
Plaintiff - Appellant	)
	)
v.	)
	)
Kansas City Freightliner Sales, Inc., doing business as Joplin Freightliner Sales; Westfall-O'Dell Motors, Inc., doing business as Westfall-O'Dell Transportation Specialist,	)
	)
Defendants - Appellees	)
	)

Appeal from U.S. District Court
for the Western District of Missouri - Joplin
(3:08-cv-05051-DW)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this

cause is affirmed in accordance with the opinion of this Court.

August 19, 2010

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

No. 08-5051-CV-S-DW

[Filed September 2, 2009]

DONALD BROWN,	)
	)
Plaintiff,	)
	)
v.	)
	)
KANSAS CITY FREIGHTLINER SALES, INC. d/b/a JOPLIN FREIGHTLINER SALES, and WESTFALL -O'DELL MOTOR COMPANY, INC. d/b/a WESTFALL-O'DELL TRANSPORTATION SPECIALIST,	)
	)
Defendant.	)

ORDER

Before the Court are cross motions for summary judgment filed by Defendant Kansas City Freightliner Sales, Inc. d/b/a Joplin Freightliner Sales and Westfall O'Dell Motor Company, Inc. d/b/a Westfall O'Dell Transportation Specialists (Doc. 31) and Plaintiff Donald Brown (Doc. 51). After a thorough review of the

parties' arguments, the record, and the applicable law, the Court finds that there are no material facts in dispute and that, for the following reasons, summary judgment in favor of Defendants is appropriate.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The court does not weigh the credibility of the evidence; rather it will focus on whether a genuine issue of material fact exists for trial. Harris v. Interstate Brands Corp., 348 F.3d 761, 762 (8th Cir. 2004). In determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party. Scott v. Harris, 550 U.S. 372, 378 (2007). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (internal citations omitted).

II. FACTUAL BACKGROUND[1]

Defendant Kansas City Freightliner Sales, Inc., operates the Joplin-area division of its company under the name Joplin Freightliner Sales ("Joplin Freightliner"). Defendant Westfall O'Dell Motor Company, Inc. ("Westfall"), does business as Westfall O'Dell Transportation Specialists. Joplin Freightliner and Westfall share common ownership, but Joplin Freightliner is not a subsidiary of Westfall. Plaintiff Don Brown was hired by Joplin Freightliner as a service technician on April 16, 2000. On Wednesday, September 26, 2007, Don Brown hurt his back while at work. He verbally reported to his supervisor that he had hurt his back, and that he wanted to go home. He did not submit a written injury report regarding his alleged back injury, even though he had submitted written reports regarding two prior injuries. Don Brown understood that it was standard procedure to complete an injury report for any workplace accident. After verbally reporting his injury, Don Brown left work for the day. He was then absent from work on Thursday September 27, Friday September 28, Monday October 1, and Tuesday October 2. On each of these days, either Don Brown or his wife called in to Joplin Freightliners to report that he was out sick and would not be into work that day. At the time of these absences, Plaintiff has already used all of his standard sick leave and vacation time. Don Brown had been employed by Joplin Freightliner for more than 12

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[1] The facts referenced herein are either undisputed or, if disputed, yet Plaintiff has properly presented facts supporting his version of the disputed facts, the disputed facts are presented in the light most favorable to the plaintiff.

months, and had worked more than 1,250 hours in the 12 months preceding September 26, 2007, and was therefore an "eligible employee" as defined by the Family Medical Leave Act (FMLA). Don Brown reported to work at Joplin Freightliners on Wednesday, October 3, 2007. That same day, his employment with Joplin Freightliners was terminated. Joplin Freightliners states that it terminated Don Brown due to his failure to come to work September 27, 2007 through October 2, 2007.

Don Brown suffered two work-related back injuries prior to his September 26th injury. On or about June 18, 2007, Don Brown was injured at work. He submitted a written injury report regarding this injury. His injury was diagnosed as a lumbar sprain or strain. He received treatment that same day, and was released back to work that same day with no work restrictions. On August 29, 2007, he injured his back at work again. He submitted a written injury report regarding this injury. His injury was diagnosed as a lumbar strain. He was prescribed medication, and was released back to work immediately, but with certain activity restrictions. He had follow-up doctor's visits on September 5, 2007 and September 10, 2007. On September 21, 2007, Plaintiff went to a follow-up examination regarding his August 29, 2007 lumbar sprain, and he was released back to work without any formal restrictions, but with instructions to "work as tolerated".

Don Brown alleges that he was physically incapacitated during the time period between September 26, 2007 and October 3, 2007. Don Brown did not seek medical treatment during this time period. After Don Brown was terminated on October 3,

2007, he did not immediately seek medical attention for his back injury. He eventually went to the doctor on October 12, 2007. The physician who treated him on October 12th noted a history of extremity numbness and an impression that Plaintiff was suffering from degenerative changes of the spine. No mention of his alleged September 26th injury nor his subsequent absences from work is made in the medical records submitted to the Court from Plaintiff's October 12, 2007 doctor's visit. Plaintiff has not indicated that the physician who treated him on October 12, 2007 will testify as to Plaintiff's condition during the period between September 26, 2007 and October 3, 2007.

Plaintiff had subsequent medical appointments on October 15, October 17, October 31, and November 26, 2007. During these medical appointments, Plaintiff's treating physicians noted that Plaintiff suffered from a history of left arm paresthesies and tingling and numbness in the left arm. On November 26, 2007, Plaintiff was treated by a Dr. Andrew, who diagnosed him with degenerative disc disease. He was then referred to Dr. Ipsen for surgery, and on April 25, 2008, Plaintiff underwent surgery to his neck. After his surgery, Don Brown reported no pain and that he "felt good". The medical records presented to the Court of Plaintiff's treatment between October 12, 2007 and May 2008 are devoid of any mention of the time period between September 26th, 2007 and October 3, 2007. Plaintiff has not pointed to, and the Court has not found on its own inspection of the record, any medical evidence that Plaintiff was incapacitated during the time period between September 26th and October 3rd. In Plaintiff's summary judgment briefing, Plaintiff has not indicated that any medical expert or treating physician will testify regarding Don Brown's alleged

period of incapacity. Plaintiff's only evidence in support of the contention that he was incapacitated during the time period in question is his own testimony.

III. DISCUSSION

Plaintiff's Amended Complaint (Doc. 24) states two claims for relief. Count One alleges Failure to Reinstate in violation of the FMLA. In Count Two, Plaintiff alleges he was wrongfully terminated in violation of the FMLA. To prevail on a Failure to Reinstate claim under the FMLA, Plaintiff must prove: 1) that he was entitled to FMLA leave; 2) that he took FMLA leave; and 3) that he was not reinstated to the same or equivalent position upon returning to work. 29 U.S.C. §§ 2612(a)(1), 2614(a)(1). To prevail on a Wrongful Termination claim, Plaintiff must prove: 1) that he was entitled to FMLA leave; 2) that he exercised rights afforded by the FMLA; 3) that [he] suffered an adverse employment action; and 4) that a causal connection exists between [his] exercise of rights and the adverse employment action. Phillips v. Mathews, 547 F.3d 905, 912 (8th Cir. 2008)(quoting Smith v. Allen Health Sys., Inc., 302 F.3d 827, 832 (8th Cir. 2002)).

Defendants contend that both of Plaintiff's claims fail as a matter of law, in that Plaintiff cannot prove that he was entitled to FMLA leave. Specifically, Defendants contend that Plaintiff cannot prove two of the requirements for entitlement to leave: 1) that he was suffering from a "serious health condition" as defined by the FMLA, and 2) that he provided Defendants with adequate notice that he was seeking FMLA leave.

Serious Health Condition:

1) Serious Health Condition under FMLA

In order for Plaintiff to be entitled to FMLA leave, he must show that he was experiencing a "serious health condition" during the absence period at issue. A "serious health condition" is defined as "an illness, injury, impairment, or physical or mental condition that involves--(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11). According to Department of Labor regulations, a serious health condition involving "continuing treatment" by a health care provider includes, as applicable to this case[2], any one or more of the following:

> (i) A period of incapacity . . . of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
>
> > (A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

---

[2] Plaintiff does not allege that he suffered from a chronic serious health condition as defined in 29 C.F.R. §825.114 during the absence period at issue.

> (B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider... 29 C.F.R. § 825.114(a).

Plaintiff did not receive in-patient care during the days he was absent from work in late September and early October 2007. Therefore, whether or not Plaintiff can prove that he was suffering from a serious health condition as defined by the FMLA turns on Plaintiff's ability to prove that he had a serious health condition that involved "continuing treatment" by a health care provider[3].

The Eighth Circuit Court of Appeals has developed a three part objective test regarding the "continuing treatment" standard found in the FMLA and the regulations implementing that standard. McDaniel v. Gates Corp., 2009 U.S. Dist. Lexis 10138 at *7-8 (W.D. Ark. 2009). To meet the requirements of the test, a party must prove (1) that [he] had a period of incapacity requiring absence from work," (2) that this period of incapacity exceeded three days, and (3) that [he] received continuing treatment by ... a health care provider within the period." Rankin v. Seagate Techs., Inc., 246 F.3d 1145, 1148 (8th Cir. 2001)(citing Thorson v. Gemini, Inc., 205 F.3d 370, 377 (8th Cir. 2000); Martyszenko v. Safeway, Inc., 120 F.3d 120, 122-23 (8th Cir. 1997) (holding that incapacity is

---

[3] Plaintiff argues that neck surgery he underwent in April of 2008 qualifies as in-patient care for purposes of his FMLA claims. The Court disagrees. The period of time he alleges should qualify as FMLA leave occurred in September and October of 2007, not in April of 2008.

required to trigger FMLA protection))(internal quotations omitted))). In this case, it is undisputed that Don Brown did not receive any treatment by a health care provider during his alleged period of incapacity. Plaintiff therefore fails to satisfy the third prong of the Rankin test, which requires that a Plaintiff be treated by a health care provider during the alleged period of incapacity. As Plaintiff did not seek treatment during this period, he cannot prove, as a matter of law, that he was suffering from a serious health condition during his period of absence. Summary judgment in favor of the Defendants is therefore appropriate in this case.

The plain language of the FMLA regulations further supports the requirement set forth in Rankin that those seeking FMLA leave for a serious health condition premised on continuing treatment must actually seek treatment during the period of absence at issue. Section 825.114 of the applicable regulations defines "period of incapacity" as "a period of inability to work, attend school, or perform other daily activites due to the serious health condition, treatment therefor, or recovery therefrom." The very next regulation, 29 C.F.R.§ 825.115, notes that an employee is "unable to perform the functions of [his or her] position where the health care provider finds that the employee is unable to work at all or is unable to perform any of the essential functions of the employee's position..." Id. (emphasis added). In short, "the plain language of the regulation indicates that to satisfy the 'unable to perform the functions of the position of employee' provision of 29 U.S.C. § 2612(a)(1)(D), Plaintiff must present some evidence that his 'health care provider' had found that he was unable to work or unable to perform an essential function of his position." Husinga

v. Federal-Mogul Ignition, Co., 519 F. Supp.2d 929, 963 (S.D. Iowa 2007). No such medical evidence is present in the record, therefore summary judgment in favor of Defendants is appropriate. Id. See also, Stiefel v. Allied Domecq Spirits & Wine U.S.A., Inc., 184 F. Supp.2d 886, 891 (W.D. Ark. 2002)(granting summary judgment where Plaintiff failed to present medical evidence supporting plaintiff's contention that she was incapacitated during the period of absence at issue).

2) Plaintiff's Estoppel Argument:

Plaintiff argues that Defendants had a duty to request medical certification of Plaintiff's serious health condition and are therefore essentially estopped from challenging the serious health condition element of Plaintiff's claims. The disputed certification procedure, located in 29 U.S.C. § 2613(d), provides "that an employer may require an employee seeking medical leave to provide certification that he has a serious health condition." Dillaway v. Ferrante, 2003 U.S. Dist. Lexis 23468 at * 22 (D. Minn. 2003)(emphasis added). The Eighth Circuit Court of Appeals addressed this issue in both Thorson v. Gemini, Inc., 205 F.3d 370 (8th Cir. 2000) and Stekloff v. St. John's Mercy Health Sys., 218 F.3d 858, 859 (8th Cir. 2000), coming to different conclusions in each case. As summarized in Dillaway, supra,:

> The Eighth Circuit first addressed this issue in Thorson v. Gemini, Inc., 205 F.3d 370 (8th Cir. 2000), in which the Court held that failure to follow the certification process prevented the employer from later challenging whether the employee had a serious medical condition. The Court noted, 'because the company did not

> resort to the protections for employers provided by the FMLA to address just this sort of situation, there is no genuine issue of fact on this part of the 'serious health condition' question.' Id. at 381. In a decision issued shortly thereafter, the Eighth Circuit took a slightly different tact, and noted its "disagreement with [plaintiff's] contention that [defendant] has waived its right to contest the fact that she has a "'serious health condition.' . . . We do not read § 2613(c)(1) as requiring an employer to obtain a second opinion or else waive any future opportunity to contest the validity of the certification." Stekloff v. St. John's Mercy Health Sys., 218 F.3d 858, 859 (8th Cir. 2000). The Court went on to cite Thorson, stating that "We note, moreover, that several of our recent cases involving the FMLA have considered employer arguments that an employee did not have a serious medical condition in spite of the fact that no second opinion was sought." Id. at 860 (citing Thorson, 205 F.3d 370).
> Dillaway, 2003 U.S. Dist. Lexis at *22.

In Stekloff, the Eighth Circuit found the language of § 2613(c)(1) to be "merely permissive," in that it grants an employer with "reason to doubt the validity" of the employee's certification the opportunity to obtain he opinion of a second health care provider. 218 F.3d at 860. Therefore, if the analysis were limited to consideration of Stekloff, Plaintiff's estoppel argument would clearly fail. The Eighth Circuit's opinion in Thorson does create some space for an estoppel argument based on failure to seek medical certification in certain cases. However, such an argument is not applicable to Don Brown's case, as it is undisputed

that he did not seek any medical treatment during his period of absence. In Thorson, the plaintiff-employee left work early on a Wednesday due to stomach cramps and diarrhea. 205 F.3d at 375. She went to the doctor that same day, was absent from work on Thursday and Friday, then returned the following Monday. Id. Upon her return she supplied her employer with a note from her doctor indicating that she was not to return to work until that Monday. Id. When she returned on Monday, she worked only a few hours before returning to the doctor with similar symptoms. Id. She continued to seek treatment from the doctor over the next week and a half, and missed several more days of work. Id. She provided her employer with a second note from her doctor regarding her additional absences. Id. Her employer did not seek any second opinion regarding the Thorson's health condition, but nonetheless terminated her. Id.

As Don Brown's case is clearly distinguishable from Thorson, his estoppel argument fails. Thorson provided her employer with two doctor's notes indicating she was unable to work due to a serious health condition, and she visited the doctor multiple times during her absence from work. When presented with this information, her employer did nothing to either verify or dispute the doctor's opinion regarding Thorson's inability to work. Thorson's employment was simply terminated without further inquiry. In contrast, Don Brown provided Joplin Freightliner with no doctor's note or documentation of any kind regarding his absences. He was incapable of providing documentation, because he did not go to the doctor. Under Plaintiff's suggested interpretation of the Thorson opinion, a plaintiff who has sought no medical attention during an unplanned absence would be able

to sidestep the serious health condition requirement in its entirety based on an employer's failure to ask for information that the employee is incapable of providing. As it is undisputed that Plaintiff didn't see a doctor during his absence, any requests made by Defendants for medical verification at that point in time would have proven futile. The Court therefore disagrees with Plaintiff's interpretation of Thorson, and finds his estoppel argument to be without merit.

Notice:

Although Plaintiff's inability to prove he was suffering from a serious health condition is dispositive of both his claims, the Court briefly addresses the notice issue. The Eighth Circuit Court of Appeals recently summarized the requirements for sufficient notice in FMLA cases. In Scobey v. Nucor Steel-Arkansas, 2009 U.S. App. Lexis 19094 (8th Cir. Aug. 25, 2009), it noted that:

> [The Eighth Circuit has] held that an employee must do more than merely call in sick to trigger an employer's duties under the FMLA. "Although the employee need not name the statute, he must provide information to suggest that his health condition could be serious." Woods v. DaimlerChrysler Corp., 409 F.3d 984, 990 (8th Cir. 2005) (citation omitted). Cf. Thorson v. Gemini, Inc., 205 F.3d 370, 381 (8th Cir. 2000) ("An employee need not invoke the FMLA by name in order to put an employer on notice that the Act may have relevance to the employee's absence from work."); Browning v. Liberty Mut. Ins. Co., 178 F.3d 1043, 1049 (8th Cir. 1999) ("Under the FMLA, the employer's

> duties are triggered when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave."). "Employees thus have an affirmative duty to indicate both the need and the reason for the leave, and must let employers know when they anticipate returning to their position. Woods, 409 F.3d at 990-91 (quotation omitted). "The employer must be made aware that the absence is due to a serious illness so the employer can distinguish it from ordinary 'sick-days,' or even malingering, as a type of unusual and privileged absence." Rask v. Fresenius Med. Care N. Am., 509 F.3d 466, 472 (8th Cir. 2007). "To hold otherwise would create an unreasonable burden for employers, requiring them to investigate virtually every absence to ensure that it does not qualify for FMLA leave." Id.
> Scobey, 2009 U.S. App. Lexis 19094 at *10-11.

Construing the facts in the light most favorable to Plaintiff Don Brown, the Court finds that Plaintiff failed to provide Joplin Freightliner with adequate notice that his health condition could be serious. The undisputed facts indicate that on the day of his injury, Don Brown told his supervisor that he had hurt his back, and that he wanted to go home. He did not fill out an accident report, nor did he seek immediate treatment. He then went home for the day. On each subsequent day of his absence, Don Brown or his wife (calling on his behalf) merely called in sick. He did not provide Joplin Freightliners with any further information regarding his injury, nor any indication as to when he would return for work. He then presented himself for work on October 3, 2007 without any

doctor's note or other medical evidence regarding his period of absence.

Based on these facts, Don Brown failed to meet FMLA notice requirements as a matter of law. Plaintiff argues that Defendants should have known that his injury was potentially FMLA qualifying based on history of previous back injuries. The Court disagrees. Plaintiff's previous two back injuries were not so serious as to keep him from working. After both his June 2007 and August 2007 injuries, Plaintiff was allowed to return to work immediately. As his previous injuries did not result in absences from work, the Court finds they do not provide a sufficient basis for Plaintiff's argument that he met the FMLA notice requirements. Plaintiff's failure to provide any sort of medical certification regarding his condition, either before he was terminated or thereafter, further undercuts his argument.

IV. CONCLUSION

For the reasons stated herein, the Court hereby ORDERS that:

1) Defendants' Motion for Summary Judgment (Doc. 31) is GRANTED in its entirety.

2)Plaintiff's Motion for Summary Judgment (Doc. 51) is DENIED.

SO ORDERED.

Date: September 2, 2009 /s/ Dean Whipple
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION

Case No. 08-5051-CV-SW-DW

[Filed September 4, 2009]

DONALD BROWN,	)
	)
Plaintiff,	)
	)
vs.	)
	)
KANSAS CITY FREIGHTLINER SALES, INC. d/b/a JOPLIN FREIGHTLINER SALES, and WESTFALL -O'DELL MOTOR COMPANY, INC. d/b/a WESTFALL-O'DELL TRANSPORTATION SPECIALIST,	)
	)
Defendant.	)

JUDGMENT IN A CIVIL CASE

___ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court.** This action came before the Court. The issues have been determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that

1) Defendants' Motion for Summary Judgment (Doc. 31) is GRANTED in its entirety.

2)Plaintiff's Motion for Summary Judgment (Doc. 51) is DENIED.

September 4, 2009
Date

Ann Thompson
Clerk of Court

/s/ Tracy L. Diefenbach
(by) Deputy Clerk

Supreme Court, U.S.
FILED
JAN 19 2011
OFFICE OF THE CLERK

180 (2)

No. 10-665

In the Supreme Court of the United States

DONALD BROWN,

Petitioner,

v.

KANSAS CITY FREIGHTLINER SALES, INC., doing business as Joplin Freightliner Sales; WESTFALL-O'DELL MOTORS, INC., doing business as Westfall-O'Dell Transportation Specialists,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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January 19, 2011

QUESTIONS PRESENTED

1. What information must an employee provide his or her employer to trigger an employer's duties under the Family Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601-2654, as further defined by 29 C.F.R. § 825.303 (1995)?

2. Does an employee, with a history of minor (non-FMLA qualifying) back injuries, provide sufficient notice to his employer to trigger the employer's duties under the FMLA when the employee leaves work early under a complaint that he has "hurt his back" again, denies that he needs to visit a doctor, and then calls in "sick" for the next four workdays?

CORPORATE DISCLOSURE STATEMENT OF RESPONDENT KANSAS CITY FREIGHTLINER SALES, INC.

Pursuant to Supreme Court Rule 29.6, Respondent Kansas City Freightliner Sales, Inc., d/b/a Joplin Freightliner Sales, states that it is not publicly traded. It does not have a parent corporation nor does any publicly-held corporation own ten percent (10%) or more of the stock of Kansas City Freightliner Sales, Inc.

CORPORATE DISCLOSURE STATEMENT OF RESPONDENT WESTFALL-O'DELL MOTORS, INC.

Pursuant to Supreme Court Rule 29.6, Respondent Westfall-O'Dell Motors, Inc., d/b/a Westfall-O'Dell Transportation Specialists, states that it is not publicly traded. It does not have a parent corporation nor does any publicly-held corporation own ten percent (10%) or more of the stock of Westfall O'Dell Motors, Inc.

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REGULATORY PROVISION INVOLVED

The definition of "serious health condition" is contained within 29 C.F.R. § 825.114 (1995). The relevant portions of that definition are as follows:

> (a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:
>
> (1) Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or
>
> (2) Continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:
>
> (i) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

STATEMENT OF THE CASE

A. Factual Background.

Respondent Kansas City Freightliner Sales, Inc., doing business as Joplin Freightliner, employed Petitioner Donald Brown as a technician, performing repairs on heavy duty trucks. Prior to the incident which gives rise to this matter, Brown had a prior history of minor lumbar sprains, for which he had received medical treatment, none of which resulted in missed time from work. On one of those prior occasions, Brown was placed on work restrictions for roughly one month, though he was still able to perform work during that period. On each of those prior occasions, Brown completed an incident report regarding his injuries.

On the afternoon of Wednesday, September 26, 2007, Brown approached his supervisor, Mike Yokely, stating that he had "hurt his back again" and

wanted to go home. When asked if he wanted to go to the doctor, Brown said no. Brown then left the workplace, without filling out an incident report.

Brown was absent from the workplace for four consecutive workdays from Thursday, September 27 through Tuesday October 2, 2007. On each of those days, either Brown or his wife called Freightliner, stating that Brown would not be coming into work because Brown was "sick." No other information was provided to Freightliner during those telephone calls.

On Sunday, September 30, 2007, Brown was seen by co-workers driving his vehicle. In the course of his deposition, Brown was asked a series of questions about whether he was able to carry out his daily activities during his absence from the workplace. During that exchange, Brown interjected that he was not "disabled" during his absence. He also conceded that the reason he was absence from the workplace was not due to being unable to work due to his injury, but rather because he was tired. He acknowledged that he did not seek out medical evaluation during his absence, but instead took prescription pain medications that were left over from his prior injuries.

On Wednesday, October 3, 2007, Brown returned to the workplace, with the intention to return to work. However, management had terminated his employment for absenteeism, as Brown had previously exhausted all of his vacation and sick leave prior to leaving the workplace on September 26, 2007.

Brown sought out medical evaluation and treatment for his claimed "back" injury for the first time on October 12, 2007, sixteen days after his claimed injury. At that time, he reported symptoms of neck pain and left arm numbness, rather than the back pain reported to his supervisor. He reported no prior trauma or injury during that examination. He was ultimately diagnosed with a *cervical* sprain, for which he received medical attention on a number of occasions, culminating in surgical treatment on April 25, 2008, where several of Brown's cervical vertebrae were surgically fused.

B. The Proceedings Below.

Brown brought suit in the U.S. district court for the Western District of Missouri against Kansas City Freightliner Sales, Inc., and its parent company, Westfall-O'Dell Motors, Inc., doing business as Westfall-O'Dell Transportation Specialists (hereafter collectively referred to as "Freightliner"). In his Complaint, Brown sought damages against Freightliner raising two claims under the Family Medical Leave Act ("FMLA"). His first claim was that his employers violated the FMLA by failing to reinstate him to his position after he returned to the workplace on October 3, 2007. For his second claim, he sought relief under a theory that his employers had retaliated against him for seeking leave under the FMLA.

After discovery was substantially completed, Freightliner filed a motion seeking summary

judgment upon Brown's FMLA claims. The district court granted that motion, concluding that Brown's claims failed because (1) Brown could not establish that his absence from the workplace was due to a "serious health condition" that would qualify for protection under the FMLA, and (2) Brown failed to provide sufficient notice to his employer that his absence from work qualified for protection under the FMLA.

Brown timely appealed the grant of summary judgment to the U.S. Court of Appeals, Eighth Circuit. While he challenged both grounds of the district court's grant of summary judgment, the Eighth Circuit only addressed the second ground (adequacy of notice under the FMLA) in its opinion.

REASONS FOR DENYING THE PETITION

A. This Matter Does Not Provide A Proper Vehicle For Addressing Brown's Claimed Circuit Split.

Freightliner disagrees with Brown's assertion that there exists a substantial disagreement between the circuit courts regarding the standard for assessing the adequacy of an employee's notice to the employer when unforeseeable leave is sought under the FMLA. However, even if such disagreement exists between the circuits, this case does not present a viable means to resolve that purported disagreement for two reasons. First, while the circuit court affirmed the grant of summary judgment in this matter on the basis of the FMLA notice issues, the summary judgment was also premised upon Brown's failure to demonstrate that his absence was due to a FMLA-qualifying serious health condition, and this alternative basis would render it unnecessary for this Court to address the notice issues raised in Plaintiff's Petition for Writ of *Certiorari*. Second, the information Brown communicated to his employer was so inadequate as not to meet the standards set by any of the federal circuit courts.

The district court's grant of summary judgment rested upon two independent grounds: (1) absence of evidence of a FMLA-qualifying "serious health condition" and (2) Brown's failure to provide adequate notice to Freightliner under the FMLA. Both grounds were argued in the proceedings before

the U.S. Court of Appeals for the Eighth Circuit. However, the circuit court, in affirming the judgment below, only discussed the notice issue in its decision. Finding that the notice issue was sufficient to resolve the appeal, it was unnecessary for the Eighth Circuit to address the district court's conclusion that Brown had failed to adequately dispute Freightliner's showing that there was no evidence from which a factfinder could conclude that Brown's absence from work was due to a "serious health condition," as defined by the FMLA.

As a threshold matter, in order to invoke the protections of the FMLA, an employee's absence must be due to a "serious health condition." 28 U.S.C. § 2611(11). Brown argued that his alleged back injury qualified as a "serious health condition" under the "continuing treatment" because his condition resulted in a period of incapacity of more than three consecutive days and involved treatment on at least two times by a health care provider.

The district court concluded that Brown could not prove that his absence was due to a "serious health condition" because he did not seek out medical evaluation or treatment during his absence from the workplace. In reaching that conclusion, the district court, in reliance upon the Eighth Circuit case of *Rankin v. Seagate Techs., Inc.*, 246 F.3d 1145, 1148 (8th Cir. 2001), as well as the language of 29 C.F.R. §§ 825.114 and 825.115 (1995). In particular, the district court noted that "incapacity," under the latter regulation, meant that the employee was "unable to perform the functions of [his or her]

position where the health care provider finds that the employee is unable to work at all or is unable to perform any of the essential functions of the employee's position...." 29 C.F.R. § 825.115. Based upon this language, and the guidance of *Rankin*, the district court concluded that Brown could not demonstrate incapacity during the period of his absence, as there was no evidence presented by Brown that his health care provider made any such finding regarding the period of his absence.[1]

The absence of any discussion in the Eighth Circuit opinion regarding this alternative ground for the grant of summary judgment does not preclude this court's consideration of whether this alternative ground provides a basis for affirming the district court's judgment. "Without cross-petitioning for certiorari, a prevailing party may, of course, 'defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected,

---

[1] This absence of evidence was compounded by his failure to designate any expert witness to offer an opinion that his alleged injury rendered him unable to work during his absence. The absence of expert testimony on this issue, was even more significant, in light of evidence presented below that Brown was not incapacitated during his absence from the workplace, including: (1) Brown's failure to seek medical treatment during the period of his absence, (2) Brown's deposition testimony that he was not "disabled" during his absence from the workplace. While Brown also attempted to relate his post-termination treatment to his pre-termination complaints. However, without expert testimony, he could not demonstrate that the post-termination treatment of his *cervical* spine for complaints neck pain and arm numbness were connected to his pre-termination treatment for back pain caused by *lumbar* sprains.

or even considered by the district court or the Court of Appeals.' " *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989) (quoting *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 476, n. 20 (1979)). That alternative basis, if upheld by this Court, would make it unnecessary to reaching the question Brown seeks to present in this appeal.

While Brown mentions this alternative ground for summary judgment in his Petition, he does not raise any Question Presented regarding this alternative basis for summary judgment. Thus, he does not contend that resolution of that alternative ground presents any issue of legal significance as to lower court's application of the FMLA. However, the existence of this alternative ground upon which the district court's judgment could be affirmed, for which Brown has not sought review, renders it unnecessary for this Court to address the issues raised in Brown's Petition to this Court.

Simply put, the existence of this alternative basis for affirming the judgment below makes this case an inadequate vehicle for addressing the issues Brown seeks to raise with regard to the standard that must be met to provide adequate notice to an employer to trigger the protections of the FMLA. The district court's judgment can be affirmed on the alternative grounds discussed in the district court judgment. Brown does not seek to put these alternative grounds before this Court for review. However, those alternative grounds render it unnecessary for this Court to take up and decide the merits of the issues

Brown discusses in his Petition for Writ of Certiorari. Accordingly, this Court should deny Brown's Petition and decline review in this matter.

B. Even If A Circuit Split Existed As To The Interpretation of 29 C.F.R. § 825.303 Before The Regulation Was Amended In 2009, The Amendment To The Regulation Makes It Inappropriate To Grant Review.

As discussed in Section C, below, Freightliner disagrees with Brown's suggestions that a split has emerged among the circuit courts with regard to the standard that should be applied to determine whether an employee has adequately notified his or her employer that a request for leave falls within the ambit of the FMLA. However, even assuming a circuit split existed, the underlying regulation was amended after the events giving rise to this case. The issues Brown seeks to raise would only have application to cases arising under the prior version of the regulation, a limited and dwindling group of cases.

The primary federal regulation governing the notice requirements under the FMLA is 29 C.F.R. § 825.303. This regulation was amended, effective January 16, 2009, after the events underlying this matter occurred. Those amendments provide specific guidance with regard to the *substance* of the notice an employee must provide to his or her employer in order to invoke protection under the FMLA. At least one circuit court has recognized that the amended

regulation places a significantly higher upon employees, compared to the regulation in effect prior to 2009. *See Saenz v. Harlingen Medical Center, L.P.*, 613 F.3d 576, 582 n. 9 (5th Cir. Aug. 2, 2010) (refusing to apply amendment retroactively because of increased burden on employee).

Under the amended version of the regulation, "[a]n employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request." 29 C.F.R. § 825.303(b). The regulation further states that the content of the notice will vary on the precise situation involved, but may include that "a condition renders the employee unable to perform the functions of the job," that "the employee ... is under the continuing care of a health care provider," and "the anticipated duration of the absence." *Id.* The amended regulation also expressly provides that "[c]alling in 'sick' without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act." *Id.*

Contrary to Brown's assertion that the notice he provided would be sufficient to satisfy the amended regulation, the circumstances of this action demonstrate that his communications to his employer fell far short of the requirements imposed by 29 C.F.R. § 825.303 (2009). The amended regulation states that merely "calling in sick," is insufficient to constitute adequate notice. Brown left the workplace early, complaining that he had hurt his back. However, over the following four workdays, he or his wife called Freightliner reporting only that

Brown was "sick" and would not be coming in to work. Neither Brown nor his wife provided any other information to Freightliner.

Brown's conduct ultimately deprived Freightliner of the information it needed to assess whether Brown's absence fell within the FMLA. Brown refused his supervisor's inquiry as to whether Brown needed to go to the doctor. Brown also failed to advise his employer of the anticipated duration of his absence. Brown failed to seek medical evaluation for weeks after his alleged back injury, such that there was no contemporaneous medical diagnosis of Brown's alleged injury, let alone any finding by a medical professional that Brown was incapacitated and unable to work during his absence from the workplace.

In summary, Brown failed to give his employer any indication that his absence from the workplace was due to anything other than a minor, transient, health issue. Certainly, he provided his employer with nothing that should have led Freightliner "to reasonably determine" that Brown's absence was due to a serious health condition for which he might qualify for leave under the FMLA. Thus, contrary to his arguments in this Court, his conduct would not satisfy the requirements of the amended regulation, 29 C.F.R. § 825.303 (2009).

The amendments to the regulation discussed above specifically address the key issues that Brown claims divide the circuit courts with regard to adequacy of notice. The amended regulation

specifically provides a standard that an employee must meet when providing notice to the employer, in that the employer must be provided sufficient information for the employer "to reasonably determine" that the employee is seeking leave under the FMLA. It also clarifies what type of information should be provided to satisfy the employee's obligation to provide adequate notice. Thus, the amendments to 29 C.F.R. § 825.303 speak directly to the differences Brown attempts to demonstrate in the Circuits' approaches to deciding whether an employee has provided sufficient notice to his or her employer that FMLA leave was being sought.

Circuits which had previously adopted more expansive views of the adequacy of employee notice under 29 C.F.R. § 825.303 prior to the 2009 amendments will undoubtedly be required to reevaluate those views in applying the amended regulation. As discussed above, at least one circuit has recognized that the amended regulation places a higher burden on the employee, compared to the prior version of the regulation. *See Saenz*, 613 F.3d at 582 n. 9. This signifies that the circuits will be re-examining their prior standards regarding adequacy of an employee's notice based upon the amended regulation. Thus, not only does the amended regulation speak specifically to the adequacy issues Brown seeks to raise to this Court, the amended regulation makes material changes to the standard an employee must satisfy.

Nevertheless, Brown argues that *certiorari* should be granted, asserting the amendment of 29 C.F.R. §

825.303 does not resolve the purported circuit split. However, Brown presents no authority to support his assertion that any pre-existing circuit split persists. He neither cites nor discusses any district or circuit court cases applying the amended regulation that provides any evidence of a continued split between the circuits on these issues. Rather, he only relies upon two pre-amendment cases, *Cavin v. Honda of America Manufacturing, Inc.*, 346 F.3d 713 (6th Cir. 2003), and *Stevenson v. Hyre Electric Company*, 505 F.3d 720 (7th Cir. 2007). Neither of these cases, which apply the *prior* version of 29 C.F.R. § 825.303, yield any basis for concluding that the circuits will meaningfully differ as to their application of the *amended* regulation.

Brown's failure to demonstrate that there exists any substantial conflict between the circuits (or even district courts in different circuits) regarding such assessments *after* the 2009 amendments to 29 C.F.R. § 825.303 suggests that either the amended regulation has resolved any divergence between the circuits or it is too early to assess what, if any, differences will emerge between the circuits in their application of the amended regulation. Thus, granting *certiorari* would be either unnecessary or premature. In either event, such review would be improvident, and Brown's Petition should be denied.

C. Brown Has Failed To Demonstrate Any Meaningful Differences Between The Circuits Regarding Their Application Of The FMLA Notice Requirements.

Brown contends that a split exists between the various circuits as to how they are applying the FMLA requirement that an employee provide sufficient notice to apprise his or her employer FMLA-qualifying leave is being sought. He also contends that notice would have been adequate in the case at bar if the standards of any other circuit would have been applied. Neither argument is persuasive.

Brown first argues that several competing standards have emerged for determining if an employee has provided adequate notice to his or her employer to trigger the employer's obligations under the FMLA. He contends that the Circuits have diverged into six different standards, roughly divided as follows. First, he describes the First Circuit as requiring the employee to state only that leave is needed. Second, Brown asserts that the Tenth Circuit requires the employee to provide enough information to indicate employee might qualify for FMLA leave. Third, Brown asserts that the Fourth, Fifth, Ninth, and Eleventh Circuits require an employee to state reason leave is needed. Fourth, Brown contends that the Second and Sixth Circuit standard is that an employee must reasonably apprise employer of request to take time off for serious health condition. Fifth, he argues that the Seventh and Third Circuit standard is that the

employer must be provided sufficient info to have "probable cause" that employee is entitled to FMLA leave. Sixth, and lastly, Brown contends that the Eighth Circuit applies a more stringent standard, that an employee must provide sufficient information to apprise employer that leave is sought for serious health condition *and* advise when the employee expects to return to work.

While Brown argues that these standards are divergent and constitute a circuit split that this Court should resolve through granting his Petition, he makes no demonstration that courts within different circuits have actually reached different outcomes on similar sets of facts. Nor does Brown discuss any circuit case expressing disagreement with how another circuit has applied the applicable FMLA regulations with regard to adequacy of notice by an employee. Thus, Brown's claim that a circuit split exists should be approached with considerable skepticism.

Rather than point to any direct disagreement between the circuits, Brown focuses on the particular language used by circuit courts in explicating their understanding of the applicable regulatory standards. He does not contrast, however, how the courts are actually *applying* that language. In short, he has not shown that the circuit courts are actually reaching divergent outcomes.

Review of the extant case law undermines Brown's argument that there are significant or material differences between the Circuits in their

application of the applicable FMLA regulations. Instead, the differences, if any, between the circuits on these issues are minor. For example, the Third Circuit has described the standards applied by the Fifth and Sixth Circuits as "nearly identical," in contrast to the distinction Brown attempts to draw between those Circuits. *Sarnowski v. Air Brooke Limousine, Inc.*, 510 F.3d 398, 402 (3rd. Cir. 2007). Thus, under Brown's classifications, the standards applied by over half of the circuits (the Second, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits) are not materially different. What Brown is attempting to describe as a "circuit split," appears to be little more than different circuits describing the same general standard in different ways, with little, if any real difference between them.

In short, Brown attempts to create a circuit split out of authority that is applying the same regulatory standard, 29 C.F.R. § 825.303 (1995). That standard requires the employee to provide notice to his employer that he is seeking FMLA-qualifying leave. In order to qualify for FMLA leave, the absence must be due to a serious health condition. The regulatory definition of "serious health condition" is complex, having multiple tests. Any differences between the express reasoning of the circuits in these cases is more likely due to the facts of individual cases and how they apply to the regulatory definitions, rather than any real differences in the underlying standards applied by the Circuits.

While the circuit courts might differ as to the specific language used to articulate the applicable standard employed in each Circuit, the application of that standard does not meaningfully differ between circuits. Rather, there appears to be a consensus among the Circuits that an employee must provide information to his or her employer that will reasonably apprise the employer that that the employee's absence is due to a FMLA-qualifying serious health condition.

One of the earliest articulations of this standard is found in *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758 (5th Cir. 1995). *See* 66 F.3d at 764. *Manuel*, in turn, has been followed a majority of the circuit courts subsequently addressing FMLA notice issues. *See, e.g., Price v. City of Fort Wayne*, 117 F.3d 1022, 1025-26 (7th Cir. 1997); *Bulmer v. Yellow Freight Systems, Inc.*, 213 F.3d 625, 2000 WL 637066 at *3 (2nd Cir. May 16, 2000); *Medina v. Coors Brewing Co.*, 232 F.3d 901, 2000 WL 1651306 at *2 (10th Cir. Nov. 3, 2000); *Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112, 1131 (9th Cir. 2001); *Beaver v. RGIS Inventory Specialists, Inc.*, 144 Fed. Appx. 452, 456 (6th Cir. 2005); *Sarnowski*, 510 F.3d at 402.

Brown also asserts that other circuit courts would have found that he provided his employer with sufficient notice that he was seeking leave under the FMLA. Brown cites and relies upon language from various circuit opinions in an attempt to show how every circuit other than the Eighth Circuit would have concluded that his notice to Freightliner

satisfied his burden under the FMLA. However, he provides no analysis of *any* circuit or district court opinion with a substantially similar constellation of facts to the case at bar. Indeed, the cases he cites and relies upon are readily distinguishable because the employer had substantially more information regarding the nature and extent of the employee's health condition than the paucity of information Brown provided to Freightliner.

1. First Circuit.

Brown argues that the First Circuit hews to a standard by which an employee need only state to his employer that leave is needed to trigger the protections of the FMLA. As there is no First Circuit case so holding, Brown instead cites two district court opinions from the Districts of Massachusetts and Puerto Rico: *Wheeler v. Pioneer Devel. Svcs., Inc.*, 349 F.Supp. 2d 158 (D. Mass 2004),[2] and *DeHoyos v. Bristol Lab. Corp.*, 218 F.Supp. 2d 222 (D. P.R. 2002), in support of his argument. More recent case law emerging from those same district

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[2] The *Wheeler* decision, if not expressly overruled, has been criticized by subsequent decisions issuing from the same district court. For example, with regard to whether notice has been sufficient to invoke the employer's burden to request certification of the employee's health condition, subsequent decisions have held that *Wheeler* should not be followed because it "would require every employer to invoke the full panoply of FMLA mechanisms or be prohibited ever after from challenging the legal adequacy of even the most paltry evidence regarding an employee's medical condition." *Call v. Fresnius Med. Care Holdings, Inc.*, 534 F.Supp.2d 184, 193 (D. Mass. 2008).

courts, however, undermines Brown's analysis. Those more recent cases demonstrate that district courts in the First Circuit have favorably cited and applied the standards adopted by the Fifth, Sixth, and Eleventh circuits.

For example, the District of Massachusetts, in *Zades v. Lowe's Home Centers, Inc.*, 446 F.Supp.2d 29 (D. Mass. 2006), considered whether an employer was entitled to summary judgment on an employee's FMLA claim due to inadequacy of notice. *See generally id.* at 44-47. In its analysis of that issue, it is clear that the district court concluded that more than a mere request for leave is necessary to trigger the employer's obligations under the FMLA. The *Zades* court cited and discussed the unpublished decision of the same district court in *Szabo v. Trs. of Boston Univ.*, 1998 WL 151272 (D. Mass. Mar.18, 1998)). *See id.* at 47. The *Szabo* decision, in turn, applies the standards applied by the Fifth Circuit in *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir.1995), and the Eleventh Circuit in *Gay v. Gilman Paper Co.*, 125 F.3d 1432, 1436 (11th Cir.1997). *Szabo*, 1998 WL 151272 at *5. Those standards require an employee to provide information sufficient to reasonably apprise the employer that FMLA-qualifying leave has been requested. *See Szabo*, 1998 WL 151272 at *5.

Similarly, in *Pagan-Colon v. Walgreens De San Patricio, Inc.*, 2010 WL 1849907 (D. P.R. May 6, 2010), the district court looked to a decision by the Sixth Circuit, in support of the proposition that an employer must be provided information "sufficient to

reasonably apprise it of the employee's request to take time off for a serious health condition." *Id.* at *4 (quoting *Walton v. Ford Motor Co.*, 424 F.3d 481, 486 (6th Cir. 2005)).

Thus, contrary to Brown's assertions, there does not exist a prevailing consensus among the district courts within the First Circuit that a mere request for leave is sufficient to trigger the FMLA. Rather, those district courts apply the same or substantially similar guiding principles as used by the Fifth, Sixth, and Eleventh circuits. Thus, applying Brown's taxonomy and the comparison of the circuits in *Sarnowski, supra*, demonstrates that the district courts in the First Circuit are also applying the same standards as in the Second, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits. Those standards require an employee to provide sufficient information to reasonably apprise the employer that the employee's absence is due to a FMLA-qualifying serious health condition. *See Manuel,* 66 F.3d at 764.

2. Tenth Circuit.

Neither of the Tenth Circuit cases Brown cites stand for the proposition that the Tenth Circuit applies a materially different standard than other circuits in assessing the adequacy of notice to the employer. Nor does either case suggest that the circumstances of the present matter would satisfy that standard.

Brown first asserts that courts within the Tenth Circuit have adopted a standard unique to that Circuit. However, the Tenth Circuit has also cited and relied upon Eighth Circuit case law in discussing adequacy of an employee's notice. *See Bryant v. American Airlines, Inc.*, 75 Fed. Appx. 699, 701 (10th Cir. 2003) (citing *Bailey v. Amsted Indus., Inc.*, 172 F.3d 1041, 1045 (8th Cir.1999)). At least one recent district court case from the Tenth Circuit has also looked to and followed Sixth Circuit case law to assess whether the information provided by the plaintiff was sufficient to notify the employer. *See Brooks v. Via Christi Regional Medical Center, Inc.*, 2010 WL 446523 at *12 (D. Kan. Feb. 4, 2010) (citing *Hammon v. DHL Airways, Inc.*, 165 F.3d 441, 451 (6th Cir. 1999)). These cases suggest that the Tenth Circuit does not consider its analysis of FMLA notice issues materially different than the approach taken by those other circuits.

Both of Brown's cited cases involved notice to the employer above and beyond the notice Brown provided to Freightliner. In *Tate v. Farmland Industries, Inc.*, 268 F.3d 989 (10th Cir. 2001), the employer believed that the employee was unable to work based upon information within a medical examination form, which reflected the employee's disclosure of a history of seizures for which he was taking prescription anti-seizure medication, and therefore put the employee on involuntary sick leave. *See* 268 F.3d at 991, 997. Here, Brown had no notice (either directly from Brown or via a doctor's report) of whether or not Brown was experiencing a "serious health condition," as that term is defined within the

FMLA, and Freightliner did not place Brown on involuntary sick leave. Thus, there is no reasonable basis to conclude that the notice provided by Brown to Freightliner would have been sufficient under the holding of *Tate*.

In *Moss v. Blue Cross, Blue Shield of Kan., Inc.*, 534 F.Supp. 2d 1190 (D. Kan. 2008), the employee had taken intermittent FMLA leave for depression on numerous prior instances. *See*, 534 F.Supp. 2d at 1196-97.[3] Evidence was offered that the employee had left voicemails and sent emails referring to her mental health condition during an extended absence. *See id.* at 1197-98. The employee also requested paperwork for FMLA leave during the absence, and those forms were provided by the employer. *See id.* at 1197. Here, Brown had no prior history of FMLA-qualifying medical treatment related to his alleged back problems, only advised his employer that he hurt his back again, and called in "sick" on each day of his absence from the workplace. He did not request FMLA forms, and went home without completing the injury report forms he had filled out on each of his prior injuries. Thus, *Moss* does not stand for the proposition that Brown's conduct constituted adequate notice to Freightliner that his absence may have been due to a FMLA-qualifying serious health condition.

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[3] The circumstances of *Moss* are strikingly similar to those of *Spangler v. Federal Home Loan Bank of Des Moines*, 278 F.3d 847 (8th Cir. 2002), which similarly held that the employer had adequate notice that the employee's absence qualified for protection under the FMLA.

3. Fourth, Fifth, Ninth, and Eleventh Circuits.

Brown cites to *Krenzke v. Alexandria Motor Cars, Inc.*, 289 Fed. Appx. 629 (4th Cir. 2008), for the proposition that the Fourth Circuit requires only a statement that the employee needs to inform the employer that he or she needs leave from work for a medical reason. *See Krenzke*, 289 Fed. Appx. at 632.

Cases interpreting *Krenzke*, however have made it clear that this meeting this standard requires more than saying "I am sick and want time off." Rather, the employee must demonstrate the need for leave. *See Reid v. Hospira, Inc.*, 2010 WL 5173210 (E.D.N.C. Dec. 13, 2010). In *Reid*, the Eastern District of North Carolina concluded that an employee who was undergoing repeated treatments for work-related injury but merely calling in "sick" failed to provide adequate notice. *See id.* [pinpoint cite not available, due to absence of star pagination]. In *Krenzke*, the notice was provided by a doctor's note sent to the employer and was found sufficient notice even though "the note was summary in nature," because "it was received from a medical doctor and stated that an extended leave was needed for medical reasons." *Krenzke*, 289 Fed. Appx. at 633. *Compare, Eze v. City of Durham*, 2010 WL 4740015 (M.D.N.C. Nov. 16, 2010) (finding doctor's note sufficient where it was written on prescription pad and stated "that Plaintiff would be 'out of work indefinitely for medical reasons.'").

Here, Brown provided no doctor's note nor any notice that extended leave was needed for medical reasons. Rather Brown merely left early due to a claimed back injury and then called in "sick" for four consecutive workdays. Thus, the information he provided does not correspond to that found sufficient by courts in the Fourth Circuit to constitute adequate notice under the FMLA.

With regard to the 5th Circuit, Brown relies on *Saenz v. Harlingen Medical Center, L.P.*, 613 F.3d 576 (5th Cir. 2010). In *Saenz*, unlike the case at bar, the employer had "extensive involvement" in the employee's treatment, such that the employer "was not left to wonder what sort of medical problem caused [the employee's] absence or whether that problem qualified for FMLA leave." *Saenz*, 613 F.3d at 581. *Saenz* also discusses an earlier 5th Circuit decision, *Greenwell v. State Farm Mut. Auto. Ins. Co.*, 486 F.3d 840 (5th Cir. 2007), as establishing "minimums" for what notice an employee must provide the employer. The *Greenwell* court noted that "the employee 'must explain the reasons for the needed leave.'" *Greenwell*, 486 F.3d at 842 (quoting *Willis v. Coca Cola Enter.*, 445 F.3d 413, 419 (5th Cir. 2006)). Ultimately, the *Greenwell* court held that "[t]he critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition." *Id.* at 842 (quoting *Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973, 977 (5th Cir. 1998)). Presented in such a manner, this standard is indistinguishable from that

applied by the Second, Fourth, Sixth, Ninth, and Eleventh Circuits circuits.

Brown characterizes the 9th Circuit as taking the position that all an employee need do to satisfy the FMLA notice requirement is to "communicate to the employer that he will be absent 'under circumstances that the FMLA might apply.'" While this reflects part of the standard applied by the 9th Circuit, it fails to recognize that the 9th Circuit nevertheless requires the employee to communicate that "leave is needed [for a qualifying reason]." *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 112, 1130 (9th Cir. 2001) (bracketed text in original). Thus, the employee must advise the employer not just that he or she is sick or injured, but that the injury rises to the level of a serious health condition. *See id.* The employee in *Bachelder* satisfied that burden by providing the employer with two doctor's note regarding her absences. *Id.* at 1131. Here, Brown provided no similar documentation to his employer.

Turning to the Eleventh Circuit, that Court has held that an "employee cannot merely demand leave; he must give the employer a reason to believe that he is entitled to it." *Cruz v. Publix Supermarkets*, 428 F.3d 1379, 1385 (11th Cir. 2005) (citing *Aubuchon v. Knauf Fiberglass, GmbH*, 359 F.3d 950, 952 (7th Cir. 2004)). The Eleventh Circuit has followed both Fifth and Seventh Circuit precedent in analyzing whether an employee has provided adequate notice under the FMLA. *See id.; Gay v. Gilman Paper Co.*, 125 F.3d 1432, (11th Cir. 1997) (citing *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758 (5th Cir.1995), *Price v.*

City of Fort Wayne, 117 F.3d 1022 (7th Cir.1997)). As the Eleventh Circuit's application of the standard is not palpably different from the other two circuits it relies upon, one cannot conclude that a circuit split exists between those jurisdictions. Similarly, the notice provided by Brown fails to meet the Eleventh Circuit's application of the notice standard for the reasons discussed above with regard to the Fifth Circuit, *supra*, and the Seventh Circuit, *infra*.

4. Second and Sixth Circuits.

Brown cites a number of district court cases within the Second Circuit standing for the proposition that "[i]n assessing notice under the FMLA, the critical question is whether information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition." *Barnett v. Revere Smelting & Ref. Corp.*, 67 F.Supp.2d 378, 385 (S.D.N.Y.1999). Defendant agrees that this proposition appears in numerous cases arising out district courts in the Second Circuit. What Brown fails to recognize, however, is that standard this was adopted from the *Fifth* Circuit. *See id.* (quoting *Manuel*, 66 F.3d at 764); *Bulmer v. Yellow Freight Systems, Inc.*, 213 F.3d 625, 2000 WL 637066 at *3 (2nd Cir. May 16, 2000). Brown offers no argument for how the Second Circuit's application of that rule differs from how it is applied by the Fifth Circuit.

Similarly, as discussed above, the standards applied by the Sixth Circuit has been held to be

"nearly identical" to that applied by the Fifth Circuit. *Sarnowski*, 510 F.3d at 402. Not surprisingly, the case Brown relies upon, *Cavin v. Honda of America Manufacturing, Inc.*, 346 F.3d 713 (6th Cir. 2004), also favorably cites and relies upon Fifth Circuit case law in discussing the FMLA notice requirements.[4] *See id.* at 724 (citing *Manuel*, 66 F.3d at 764). *Compare, Gipson v. Vought Aircraft Industries, Inc.*, 387 Fed.Appx. 548, 556 (6th Cir. 2010) (citing and relying upon Fifth and Seventh circuit precedent in evaluating whether reports to an employer that an employee was "sick" are sufficient to trigger an employer's duties under the FMLA).

In *Cavin*, the Sixth Circuit held that an employee had provided sufficient notice to his employer by calling in and reporting that he had been in the hospital due to a motorcycle accident and that he was unable to work. *Id.* at 725. Here, Brown merely told his employer that he had hurt his back and wanted to go home, and then called in "sick." Unlike the

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[4] It is notable that *Cavin* does criticize two other circuit court opinions, issued by the Tenth and Seventh circuits, but in regard to the separate issue of whether an employee's failure to comply with an employer's FMLA notice procedures can constitute grounds for denying FMLA leave where an employee's need for FMLA leave is unforeseeable. *See id.* at 721-22 (discussing *Holmes v. The Boeing Co.*, 166 F.3d 1221, 1999 WL 9760, at *3 (10th Cir. Jan.12, 1999), and *Lewis v. Holsum of Fort Wayne, Inc.*, 278 F.3d 706 (7th Cir. 2002)). That legal issue, however, is not present in the case at bar, which concerns merely the adequacy of Brown's notice to Freightliner, not whether Brown failed to comply with any particular notice procedure implemented by Freightliner.

employee in *Cavin*, Brown provided Freightliner with no information regarding medical treatment or inability to work. Thus, the facts of the case at bar involve information provided to the employer that falls well below what the *Cavin* court considered suitable notice.[5] *Cavin* does not support Brown's claim that the information he provided Freightliner was sufficient to trigger the employer's obligations under the FMLA.

5. Third and Seventh Circuits.

Brown describes the standard adopted by the Third and Seventh Circuits as requiring an employee to present sufficient information that the employer has "probable cause" that the employee may be entitled to FMLA leave. However, this "probable cause" standard has not been adopted by any Third Circuit decision cited by Brown. Rather, Brown relies upon a district court decision for that language. In looking to reported Third Circuit Decisions, however, it is clear that the Third Circuit does not meaningfully diverge from its sister circuits in reviewing questions regarding whether an

[5] In *Gipson*, the Sixth Circuit provided additional indication as to what specific information an employee must provide to satisfy the FMLA notice requirement. Specifically, the employee must "reasonably inform [the Employer] that [the Employee] was presently suffering from 'an illness, injury, impairment, or physical or mental condition that involves ... (A) inpatient care in a hospital, hospice, or residential medical care facility or (B) continuing treatment by a health care provider' as defined in the applicable regulations." *Gipson*, 387 Fed. Appx. at 555-56.

employee's notice to his employer was sufficient to trigger the employer's duties under the FMLA.

In *Sarnowski v. Air Brooke Limousine, Inc.*, 510 F.3d 398, 402 (3rd. Cir. 2007), the Third Circuit discussed and applied the "nearly identical" standards of the Fifth and Sixth Circuits. *See* 510 F.3d at 403. Thus, to the extent that the Third Circuit applies a "probable cause" standard, it does not appear to meaningfully diverge from the Fifth and Sixth Circuit analysis discussed above.

With regard to the Seventh Circuit, Brown looks to *Stevenson v. Hyre Elec. Co.*, 505 F.3d 720 (7th Cir. 2007), quoting that court as stating that "the notice requirement is not demanding." However, "neither is it illusory." *de la Rama v. Illinois Dept. of Human Services*, 541 F.3d 681, 687 (7th Cir. 2008). Rather, "the notice must succeed in alerting the employer to the seriousness of the health condition." *Stevenson*, 505 F.3d at 725. Here, Brown provided no information to alert Freightliner that Brown had experienced anything other than a minor, transient back injury similar to other back problems he had encountered in the past. The Seventh Circuit has recognized that an employer can sometimes be provided notice by the circumstances surrounding an employee's absence, such as a "dramatic, observable change in [an employee's] work performance or physical condition." *See de la Rama*, 541 F.3d at 687 (quoting *Burnett v. LFW Inc.*, 472 F.3d 471, 480 (7th Cir.2006)). However, such circumstances are not present here. Thus, the FMLA notice standard, as

applied by the Seventh Circuit was not met by Brown in this matter.

6. Eighth Circuit.

Brown argues that the standard applied by the Eighth Circuit differs from its sister Circuits in two respects. First, he argues that the Eighth Circuit requires an employee to advise the employer of when he anticipates returning to work. Second, he argues that the Eighth Circuit also requires that an employee provide the "exact diagnosis" to his employer.

The Eighth Circuit has taken a broader view as to what information an employee can (and perhaps should) provide to an employer to provide adequate notice under the FMLA. Information regarding when an employee anticipates returning to work can help an employer understand that the leave might be FMLA-qualifying, especially if the absence is expected to last more than three consecutive days. *See* 29 C.F.R. 825.114(a)(2)(i) (1995) (discussing three-day incapacity test that to determine whether an illness or injury is a "serious health condition"). Thus, the Eighth Circuit has reasonably inquired, in appropriate cases, whether an employee has provided such information to his employer (especially when other information regarding the seriousness of the employee's health condition is lacking).

However, the Eighth circuit has not made this inquiry a mandatory part of its standard. For

example, in *Murphy v. FedEx Nat'l LTL, Inc.*, 618 F.3d 893, 903-04 (8th Cir. 2010), the Eighth Circuit held that an employee had provided sufficient notice that she was requesting FMLA leave, without any discussion of whether the employee had or had not advised the employer when she expected to return to work. *See id.*

In summary, while the various circuit courts have employed slightly different language in describing the applicable standard for determining the adequacy of an employee's notice to his or her employer that he or she is seeking FMLA-qualifying leave, Brown has failed to demonstrate that these differences in language have resulted in any material differences in how the circuits apply that standard. Rather, the dominant analysis, derived from the Fifth Circuit decision in *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758 (5th Cir. 1995), requires a showing that

CONCLUSION

For the reasons discussed above, Brown's Petition for Writ of Certiorari should be denied. First, the existence of alternative grounds for affirming the judgment below render it unnecessary to reach the issues raised in Brown's Petition. Second, the case at bar arose prior to the 2009 amendment of 29 C.F.R. § 825.303. As such, this matter would only address the standards applicable to pre-amendment cases, which are finite and dwindling at this point. Lastly, Brown's suggestion that review of this matter is needed to resolve a split amongst the federal circuits as to employees' burden to provide adequate notice under the FMLA is not supported by the reported cases. The extant cases demonstrate no material deviation between how different circuits are applying the regulatory standard. However, even if such deviations among the circuits existed, Brown has failed to make any showing that such differences persist after the 2009 regulatory amendments.

RESPECTFULLY SUBMITTED,

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